

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

YEMANE AMARE,

Plaintiff(s),

v.

CAROLYN W. COLVIN,

Defendant(s).

Case No. 2:12-CV-955 JCM (VCF)

ORDER

Presently before the court is plaintiff's counsel Richard A. Harris's ("counsel") motion for approval of attorney's fees pursuant to 42 U.S.C. § 406. (ECF No. 27). Defendant Carolyn W. Colvin filed a response in her official capacity as the Commissioner of Social Security. (ECF No. 28). Counsel filed a reply. (ECF No. 29).

I. Background

On June 6, 2012, plaintiff, Yemane Amare, filed a complaint against the commissioner of social security seeking retroactive benefits. (ECF No. 1). Plaintiff and counsel contracted on a contingency basis whereby counsel was to receive twenty-five percent of awarded retroactive benefits. (ECF No. 27).

In the initial proceedings before the Social Security Commission, the commission did not grant retroactive benefits. (ECF No. 21). On appeal to Magistrate Judge Ferenbach, the court reversed the decision and remanded the case back to the Social Security Commission to properly evaluate the evidence. (*Id.*).

On remand, the parties stipulated to a payment of \$6,634.20 in attorney's fees under the Equal Access to Justice Act (EAJA) 28 U.S.C. § 2412(d). (ECF Nos. 22, 26). The court awarded plaintiff "almost \$94,000" in retroactive benefits. (ECF No. 3 at 10).

1 Counsel moves for approval of attorney's fees amounting to 25% of the retroactive
 2 benefits. (ECF No. 27). After deducting the already-awarded EAJA fee of \$6,634.20, counsel
 3 requests approval of a net fee of \$15,249.98. (ECF No. 29).

4 **II. Legal Standard**

5 Under 42 U.S.C. § 406(b), "the court may determine and allow as part of its judgment a
 6 reasonable fee . . . not in excess of 25 percent of the total of the past-due benefits to which the
 7 claimant is entitled by reason of such judgment." The purpose of § 406(b) is to control, not
 8 displace, contingency "fee agreements between Social Security benefits claimants and their
 9 counsel." *Gisbrecht v. Barnhard*, 535 U.S. 789, 793 (2002). "The attorney for a successful
 10 claimant must show that the fee sought is reasonable for the services rendered." *Id.* at 807. The fee
 11 is payable "out of, and not in addition to, the amount of [the] past-due benefits." *Id.* at 795.

12 The district court has an "affirmative duty to ensure" the fees are reasonable because the
 13 Social Security Administration has no direct interest in attorney's fees. *Crawford v. Astrue*, 586
 14 F.3d 1142, 1146 (9th Cir. 2009). However, "the fee awards should be sufficient to encourage
 15 adequate representation of claimants" because court-awarded fees are "the only way a successful
 16 SSDI ["Social Security and Disability"] attorney recovers fees for work." *Id.* at 1147. An attorney
 17 has the burden of showing fees are reasonable. *Id.*

18 To determine reasonableness, district courts begin by looking to the contingency fee
 19 agreement. *Id.* at 1151. Accordingly, the court looks first to the agreement and adjusts downward
 20 if the fees are unreasonable. *Id.* A fee is unreasonable, and subject to reduction, if "the attorney
 21 provided substandard representation or engaged in dilatory conduct in order to increase the accrued
 22 amount of past-due benefits," or the fees are large compared to time the attorney spent on the case.
 23 *Id.*

24 **III. Discussion**

25 Plaintiff's counsel requests an order granting payment of attorney's fees pursuant to 42
 26 U.S.C. § 406(b), paid out of retroactive benefits awarded to the plaintiff. (ECF No. 27). Counsel
 27 argues the fees are reasonable based on the time spent, the risk of going unpaid, and benefit to the
 28 client. (*Id.*). Defendant argues counsel's request is invalid because counsel has not served plaintiff

1 with a copy of the motion. (ECF No. 28). Defendant argues further the court should examine the
 2 agreement itself before making a determination. (*Id.*). Counsel responds that the law does not
 3 require counsel prove the client was notified before fee approval under § 406(b). Defendant cites
 4 no binding authority to the contrary. Counsel has also represented that he has provided plaintiff
 5 with notice. (ECF No. 29).¹

6 The court grants counsel's fee request. Having examined the agreement, this court finds
 7 counsel has demonstrated that the fees are reasonable based on time spent, risk, and benefit to the
 8 client. (*See* ECF No. 29-3 "exhibit contract.") Using the contingency agreement as a baseline, the
 9 court will only reduce attorney's fees if they are found unreasonable. *Crawford*, 586 F.3d at 1145.
 10 Reduction is inappropriate here because counsel spent over forty hours representing the plaintiff
 11 in federal court, took a risk that compensation would not be awarded, and provided a substantial
 12 benefit to the client.

13 The result of representation is a benefit award of almost \$94,000 and continuing monthly
 14 payments of approximately \$1,068.² (ECF No. 27). The court notes that the need for representation
 15 in SSDI cases favors erring towards enforcement of contingency agreements because "attorneys
 16 [assume] significant risk in accepting these cases, including the risk that no benefits [are] awarded.
 17 . . ." *See Crawford*, 586 F.3d at 1152. The court therefore finds the fees are reasonable.

18 The court approves attorney's fees in the amount of \$15,349.98. This number was
 19 determined by calculating twenty-five percent of plaintiff's awarded retroactive benefits, then
 20 deducting the awarded EAJA fee. Counsel originally argued this number was \$16,840.78 after
 21 deducting an EAJA fee of \$6,634; however, counsel subsequently lowered his request. Consistent
 22 with counsel's lowered request and § 406(b), the court grants attorney's fees of \$15,349.98.

23 . . .
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26 ¹ Whether counsel has notified the plaintiff is not relevant to an order affirming attorney's fees. Communication with
 27 a client is an ethical question beyond the scope of this opinion. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rule
 1.4 "*communications*." Further, counsel asserts he *has* alerted plaintiff. This court has no reason to conclude
 otherwise.

28 ² Defendant did not argue the counsel's requested fees were unreasonable. (*See* ECF No.
 28)

